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NO. 82171

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

MARINE TERMINALS CORPORATION AND
INA/PACIFIC EMPLOYERS INSURANCE COMPANY,

Petitioners,

vs.

JOHN F. KELLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

KATHRYN E. RINGGOLD
AIROLA, RINGGOLD & WILLIAMS
1242 Market Street
Second Floor
San Francisco, CA 94102
(415) 864-6510

Attorneys for Respondent

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LIST OF PARTIES

Marine Terminals Corporation
INA/Pacific Employers Insurance Group
John F. Kelly
Director, Office of Workers' Compensation Programs, United States Department of Labor

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INA/PACIFIC EMPLOYERS INSURANCE GROUP,

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RESPONDENT'S BRIEF

Respondent, John F. Kelly, respectfully requests that the Petition for Writ of Certiorari be denied. The Decision of the Ninth Circuit Court of Appeals, herein, is in accordance with the Decision of the Second Circuit in Arbeeny v. McRoberts Protective Agency, 642 F.2d 672 (2d Cir. 1981). The Decision of the Ninth Circuit Court of Appeals, herein is consistent with the

Supreme Court's decision in Pfeiffer Company, Inc. vs. Diverson Ford, 444 U.S. 69, 62 L.Ed. 2d 225; 100 S.Ct. 328 (November 27, 1979) (incorrectly cited in Petitioner's Brief) in that the Court found that the Respondent's major function as a waterfront guard was to protect against the loss of cargo which serves a maritime purpose..the safe transit of goods shipped by sea.

STATEMENT OF THE CASE

The question in this case is whether the Respondent was engaged in "maritime employment" as defined by Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3) when he sustained an injury for which he sought compensation. §902(3) states the following:

> "The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any vessel under eighteen tons net."

The Respondent had worked for one and a half years as a waterfront security guard. His duties involved providing cargo security within terminal areas for various employers. These areas included the pier, docks, ships and adjacent areas of the terminal. His function was to prevent theft and fire, report on downed fences or unauthorized persons and read the temperatures on refrigerated containers to ensure that they were constant. At the time of the accident, the containers and chassis in the yard were empty. However, the containers were being used in maritime commerce.

On the evening of his injury, the Respondent was acting as a rover, a job which involves his moving all over the terminal. He had made a stop at a warehouse to check on certain items that were to be shipped. At the time of the injury, he was attempting to find Key Number 5 which was bordered on both sides by containers which were stacked on either side reaching approx-

imately 60 feet in an area called the Container Yard. The lights were off in the area. The Respondent struck his foot against a concrete box which has electrical outlets for refrigerated containers and as a result he stumbled and fell, striking various parts of his body.

The matter was heard before an Administrative Law Judge who concluded that the Respondent was engaged in maritime employment under §902(3) since containers are clearly an integral part of loading and unloading operations and their security is as important as their maintenance or their repair.

The Petitioners appealed to the Benefits Review Board who vacated the award of the Administrative Law Judge in a two to one decision, noting that in Arbeeny v. McRoberts Protective Agency, Inc. (supra), the Second Circuit found the injured employees covered on the basis that guard duties involved an integral part of the loading and unloading process. The majority stated it could not

agree with the Second Circuit's analysis . In his dissenting opinion, the Administrative Appeals Judge cited Arbeeny v. McRoberts Protective Agency, Inc., (supra) 672 at 675 in which the Second Circuit had found that providing security against the loss of cargo unquestionably serves a maritime purpose... the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation. Respondents petitioned to the United States Court of Appeals for the Ninth Circuit for review of the Order of the Benefits Review Board, arguing that the Decision of the Benefits Review Board was not in accordance with the Decision of the Second Circuit.

On June, 3, 1982, the Ninth Circuit of Appeals filed its Order for Publication in which it found that the facts herein are indistinguishable from those in Arbeeny v. McRoberts Protective Agency, Inc., (supra). The Court reversed the Board's Order for the

reasons stated in Arbeeny (supra).

ARGUMENT

In P. C. Pfeiffer Company, Inc. v. Diverson Ford (supra), this Honorable Court stated that it believed that §2(3)'s explicit use of the terms "longshoreman" and "other person's" engaged in "longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act. This Honorable Court further noted that persons moving cargo directly from ship to land transportation are engaged in maritime employment and that a worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process. In Arbeeny v. McRoberts Protective Agency, Inc. (supra), Arbeeny was a pier guard whose primary duty was to ensure the protection of cargo on the pier, dock and adjacent areas of marine

terminals against theft, pilferage, vandilism and fire. While most of the surveillance activity was performed on the pier, at times Petitioners were obliged to board vessels and position themselves on gangways, decks or in ships hatches or holds. When valuable cargo was involved they were required to go below the deck to ensure the safety of the cargo. On occasion, Arbeeny counted the cargo with a "checker" whose responsibilty was to check and record the cargo removed from the hatch. The Second Circuit found that it was not dispositive of the issue of "status" that Arbeeny was not in a job designated as a longshoreman nor was it essential that he physically load or off load cargo. Finding that the activities of Arbeeny were an integral part of the loading and unloading of the cargo, the Second Circuit found Arbeeny to be engaged in maritime employment. Respondent's duties in the instant case are almost identical. As noted above, his duties involved providing cargo

security for various employers on piers, docks, ships and adjacent areas of the terminal. His function was to prevent theft and fire, report on downed fences or unauthorized persons and read the temperatures on the refrigerated containers to ensure that they were constant. The issue in Arbeeny was whether or not Arbeeny was within the "status" requirement of the Act as set out §2(3). In its Order for Publication, the Ninth Circuit found that the facts in this appeal from the Decision of the Office of Workers' Compensation Program denying coverage under §2(3) are indistinguishable from those in Arbeeny and that, as in Arbeeny, the Respondent was covered because in protecting cargo from theft he was an integral part of the loading and unloading process. The Decision of the Ninth Circuit Court of Appeals followed the requirements of the Supreme Court decision in Pfeiffer that a worker responsible for some portion of moving cargo directly from ship to land is as much

an integral part of the process of loading or unloading a ship as a person who participates in the entire process. Petitioner's Writ of Certiorari should therefore be denied.

CONCLUSION

Respondenet submits that the facts and case laws set out above supports a finding that the Decision of the Ninth Circuit Court of Appeals follows the requirement of Supreme Court decisions on the issue of the "status" requirement. Respondent respectfully requests that the Writ of Certiorari be denied.

Date: August 20, 1982

Respectfully submitted,

AIROLA, RINGGOLD & WILLIAMS

BY: Kathryn E. Ringgold

KATHRYN E. RINGGOLD